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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 143.

WILLIAM C. LOBENSTEIN, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JANUARY 28, 1874.

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SUPREME COURT OF THE UNITED STATES.

No. 143.

WILLIAM C. LOBENSTEIN, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Claimant's petition	1	1
Traverse	5	4
Final judgment of the court	6	4
Application for allowance of appeal	7	4
Order allowing same	7	4
Finding of facts and conclusions of law by the court	8	5
Opinion of the court	10	7
Proposed findings by claimant and the indorsement of the court thereon	12	8
Certificate	15	9

1 *Petition.*

U. S. Court of Claims. December term, 1871.

W. C. LOBENSTEIN
vs.
THE UNITED STATES. } No. 6416. Filed February 17, 1872.—J. R.

Petition of W. C. Lobenstein, a citizen of the United States, respectfully represents:

That on the 26th day of July, 1869, he entered into a written contract with Brevet Brigadier-General M. R. Morgan, commissary of subsistence, acting on behalf of the United States Government, for the purchase of four thousand average size beef-hides, dry-cured and in good order, deliverable at Fort Sill, Indian Territory; that on the same day he entered into a written contract with the same officer, acting on behalf of the United States Government, for the purchase of two thousand average size beef-hides, dry-cured and in good order, deliverable at Camp Supply, Indian Territory. A copy of each of said contracts, marked respectively extracts "A" and "B," is hereto attached, and petitioner prays they may be read and considered as part of this petition.

Petitioner shows that, by the terms of the said contracts, he was entitled to receive, at the two places mentioned, from the officers of the Subsistence Department U. S. Army, the aggregate number of 6,000 average size beef-hides, dry-cured and in good order, for the aggregate sum of twelve thousand dollars, being at the rate of two dollars each for said hides.

Petitioner further shows that immediately after he entered into said contracts he prepared himself fully to carry out and perform the same on his part, and sent the necessary competent agents to Camp Supply and to Fort Sill, and provided himself with the necessary means to pay the price stipulated in said contracts for the number of hides mentioned, viz, 6,000. And petitioner shows that he was at all times during the continuance of said contracts willing and anxious to carry out the said contracts on his part, and was fully prepared at all times to carry out and perform the same.

Petitioner further shows that the United States Government failed or refused to carry out and perform the said contracts, and failing and refusing so to do, did not perform the same or any part of said
2 contracts, and that no part of the said hides were delivered to petitioner upon either of said contracts, although petitioner was ready and anxious to receive them and prepared to pay for them.

Petitioner further shows, that hides of the quality specified in said contracts were worth during the continuance of said contracts the sum of five dollars and sixty cents each, and that the necessary expense, including pay and expenses of agents, transportation and all incidental expenses of receiving said hides at the places designated and transporting them to market and selling them would not exceed one dollar each, and that if said contracts had been carried out and performed on the part of the United States Government he would have received for said hides the sum of fifteen thousand and six hundred dollars over and above the purchase money and expenses of receiving and moving the same to market.

Petitioner further shows that in order to prepare himself to carry out and perform the said contracts he necessarily paid out and expended

the sum of twelve hundred and sixty dollars and forty-two cents in the hire and expenses of agents employed on his part.

Petitioner further shows that he is entitled to recover from the United States Government on account of the said breach of the said contracts, the aggregate sum of sixteen thousand eight hundred and sixty dollars and forty-two cents, ($16,860.42,) the same being for the profits he was entitled to by the said contracts and the actual expenses he necessarily incurred in carrying the same out on his part.

Petitioner further shows that he has always borne true allegiance to the United States Government, and has never voluntarily aided, abetted, or given encouragement to the rebellion against the said Government; and he prays judgment of this honorable court for the said sum of $16,860.42, and for such other and further relief as the nature of the case seems to demand.

HARVEY SPALDING,
Attorney for Claimant.

Harvey Spalding, being duly sworn, deposes that he is the attorney for the claimant; that no transfer or assignment of said claim, or any part thereof, or any interest therein, has been made, except as in said petition is stated; and that the claimant is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsetts; and that he believes the facts as stated in said petition are true.

HARVEY SPALDING.

Sworn to and subscribed before me this 17th day of February, 1872.
[SEAL.] EDM. F. BROWN,
Notary Public.

Address of claimant's solicitor: C. F. Peck, Washington, D. C.

3 Copy.] [A.]

Articles of agreement between Bt. Brig. Gen. M. R. Morgan, C. S., U. S. Army, on the part of the U. S. of the first part, and W. C. Lobenstein, of Leavenworth County, State of Kansas, of the other part, made on the twenty-sixth day of July, one thousand eight hundred and sixty-nine.

This agreement witnesseth: That said party of the second part shall have all the hides of beef-cattle slaughtered for Indians at Fort Sill, Indian Territory, up to and including June 30th, 1870, which the superintendent of Indian affairs at that place shall decide are not required for the comfort of the Indians—the number of hides to be about four thousand, (4,000,) more or less. The hides shall be of average size, and, when turned over, dry-cured and in good order and condition. They shall be turned over on the spot to the said party of the second part, or his authorized agent, at the end of each month, at which time said agent of the party of the second part shall give a receipt for the number of hides turned over to him in good order and condition, and the responsibility of the party of the first part on account of those hides shall then cease.

The agent of the said party of the second part shall superintend the skinning and curing of the hides.

For and in consideration of the hides received the party of the second part shall pay monthly the party of the first part the sum of two dollars ($2.00) per each and every hide received, upon the party of the first part

surrendering the receipt of the agent of the party of the second part for the number of hides received.

It is understood that while the party of the first part, after the turning over of the hides to the party of the second part, is not responsible for their safety and care, he will furnish such shelter and protection for the hides as he can conveniently control.

Subscribed to the day and year first above written.

M. R. MORGAN,
Bvt. Brig. Gen. & C. S.
W. C. LOBENSTEIN.

Witness:
(Signed) CARL MOLER.
C. S. OWENS.

Copy.] [B.]

Articles of agreement between Bt. Brig. Gen. M. R. Morgan, C. S. U. S. Army, on the part of the U. S., of the first part, and W. C. Lobenstein, of Leavenworth County, State of Kansas, of the other part, made on the twenty-sixth day of July, one thousand eight hundred and sixty-nine.

This agreement witnesseth: That the said party of the second part shall have all the hides of the beef-cattle slaughtered for Indians at Camp Supply, Indian Territory, up to and including June 30th, 1870, which the superintendent of Indian affairs at that place shall decide are not required for the comfort of the Indians—the number of hides to be about two thousand, (2,000,) more or less.

4

The hides shall be of average size, and, when turned over, dry-cured and in good order and condition. They shall be turned over, on the spot, to the said party of the second part, or his authorized agent, at the end of each month, *or* which time said agent of the party of the second part shall give a receipt for the number of hides turned over to him in good order and condition, and the responsibility of the party of the first part on account of said hides shall then cease.

The agent of the party of the second part shall superintend the skinning and curing of the hides.

For and in consideration of the hides received, the party of the second part shall pay monthly the party of the first part the sum of two dollars for each and every hide received, upon the party of the first part surrendering the receipt to the agent of the party of the second part for the number of hides received.

It is understood that while the party of the first part, after the turning over of the hides to the party of the second part, is not responsible for their safety and care, he will furnish such protection and shelter for the hides as he can conveniently control.

Subscribed to the day and year first above written.

M. R. MORGAN,
Bvt. Brig. Gen. & C. S.
W. C. LOBENSTEIN.

Witness:
(Signed) CARL MOLER.
C. S. OWENS.

5 In the Court of Claims of the United States, December term, A. D. 1871.

W. C. LOBENSTEIN
vs.
THE UNITED STATES. } No. 6416. Filed May 15, 1872.

And now comes the Attorney-General, on behalf of the United States, and makes answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, denies each and every the allegations therein contained, and calls for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the United States are indebted to the said claimant in the sum of sixteen thousand eight hundred and sixty dollars and forty-two cents, says that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, denies the said allegation.

WM. MCMICHAEL,
Assistant Attorney-General.

6 In the Court of Claims.

WILLIAM C. LOBENSTEIN
vs.
THE UNITED STATES. } 6416.

At a Court of Claims, held at the Capitol, in the city of Washington, the first day of December, A. D. 1873, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the said claimant take nothing by his suit, and that his petition be dismissed.

7 United States Court of Claims, Dec. term, 1873.

W. C. LOBENSTEIN
vs.
THE UNITED STATES. }

Now comes the said claimant by his attorneys, and moves for an appeal to the Supreme Court of the United States, from the judgment of this court heretofore rendered in this cause.

C. F. PECK,
Atty. of Claimant.

Filed January 14, 1874.

Allowed as prayed for.

By the court.

JANUARY 14, 1874.

8 United States Court of Claims.

W. C. LOBENSTEIN
vs.
THE UNITED STATES. } No. 6416.

Finding of facts and conclusions of law.

In this case the court, upon the evidence, finds the facts to be as follows:

In the year 1869, an arrangement was entered into between the Department of the Interior and the Department of War, for the supply, through the Subsistence Department of the Army, of beef-cattle to the Indians, in pursuance of the fourth section of the act of April 10, 1869, "making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June 30, 1870." (16 Stat. L., 13, 40.)

By that arrangement the Department of War undertook to supply, through its Subsistence Department, such cattle as should be needed for Indians in the vicinity of Camp Supply and Fort Sill; and in reference thereto, as well as to other matters, the Commissary-General of Subsistence of the Army, on the 26th of May, 1869, gave written instructions to Brevet Major-General H. F. Clarke, assistant commissary-general of subsistence in the Military Division of the Missouri; which instructions, in connection with the matter of furnishing said cattle, contained the following words:

"The cattle should be by contract, if possible—delivered by the contractors monthly or weekly, and when received, actually weighed upon the scales, to be transferred to the agents on foot; the Indians to have the benefit of the fifth quarter extra. The hides to be preserved and saved for sale when practicable."

The agents here referred to were officers of the Army, appointed to act as Indian agents at the several places where subsistence-supplies were to be issued to the Indians.

General M. R. Morgan, chief commissary of subsistence of the Military Department of the Missouri, stationed at Fort Leavenworth, Kansas, was charged with the supervision of the subsistence of the Indians on the Southern Reservation, which included those to be supplied from Camp Supply and Fort Sill; and the aforesaid instructions to General Clarke were transmitted to him for his guidance.

Supposing himself thereto authorized by the above quoted words of said instructions, the said Morgan entered into the two written contracts with the claimant sued on, and which are in the words following, to wit:

Articles of agreement between Bt. Brig. Gen. M. R. Morgan, C. S., U. S. Army, on the part of the U. S., of the first part, and W. C. Lobenstein, of Leavenworth County, State of Kansas, of the other part, made on the twenty-sixth day of July, one thousand eight hundred and sixty-nine.

9 This agreement witnesseth: That the said party of the second part shall have all the hides of beef-cattle slaughtered for Indians at Fort Sill, Indian Territory, up to and including June 30, 1870, which the superintendent of Indian affairs at that place shall decide are not required for the comfort of the Indians; the number of hides to be about four thousand, (4,000,) more or less. The hides shall be of

average size, and, when turned over, dry-cured and in good order and condition. They shall be turned over on the spot, to the said party of the second part or his authorized agent, at the end of each month, at which time said agent of the party of the second part shall give a receipt for the number of hides turned over to him in good order and condition, and the responsibility of the party of the first part on account of said hides shall then cease.

The agent of the said party of the second part shall superintend the skinning and curing of the hides.

For and in consideration of the hides received, the party of the second part shall pay, monthly, the party of the first part the sum of two dollars ($2.00) for each and every hide received, upon the party of the first part surrendering the receipt of the agent of the party of the second part for the number of hides received.

It is understood that while the party of the first part after the turning over of the hides to the party of the second part is not responsible for their safety and care, he will furnish such protection and shelter for the hides as he can conveniently control.

Subscribed to the year and day first above written.

M. R. MORGAN,
Bvt. Brig. Genl. & C. S.
W. C. LOBENSTEIN.

Articles of agreement between Bt. Brig. Gen. M. R. Morgan, C. S., U. S. Army, on the part of the U. S., of the first part, and W. C. Lobenstein, of Leavenworth County, State of Kansas, of the other part, made on the 26th day of July, one thousand eight hundred and sixty-nine.

This agreement witnesseth: That the said party of the second part shall have all the hides of the beef-cattle slaughtered for Indians at Camp Supply, Indian Territory, up to and including June 30, 1870, which the superintendent of Indian affairs at that place shall decide are not required for the comfort of the Indians; the number of hides to be about two thousand, (2,000,) more or less. The hides shall be of average size, and, when turned over, dry-cured and in good order and condition. They shall be turned over on the spot to the said party of the second part, or his authorized agent, at the end of each month, at which time said agent of the party of the second part shall give a receipt for the number of hides turned over to him in good order and condition, and the responsibility of the party of the first part on account of said hides shall then cease.

The agent of the said party of the second part shall superintend the skinning and curing of the hides.

For and in consideration of the hides received the party of the second part shall pay, monthly, the party of the first part the sum of two dollars ($2.00) for each and every hide received, upon the party of the first part surrendering the receipt of the agent of the party of the second part for the number of hides received.

It is understood that while the party of the first part, after the turning over of the hides to the party of the second part, is not responsible for their safety and care, he will furnish such protection and shelter for the hides as he can conveniently control.

Subscribed to the day and year first above written.

M. R. MORGAN,
Bvt. Brig. Gen. & C. S.
W. C. LOBENSTEIN.

It does not appear that any other authority than the above-quoted words from the Commissary-General's instructions was given, either to said Clarke or said Morgan, in reference to the preservation, saving, or sale of hides.

In September, 1869, the Commissioner of Indian Affairs directed that the cattle should all be turned over to the Indian agent on the hoof, which was done; and they gave them out from time to time to the Indians, by whom they were killed and cut up; and no cattle were slaughtered for the Indians at Fort Sill or at Camp Supply by any one acting under the authority of the United States; and the claimant obtained no hides of cattle furnished to the Indians at either of those posts during the period of time covered by the said contracts.

The number of cattle supplied to the Indians from the date of said contracts to June 30, 1870, was, at Fort Sill, 2,641; and at Camp Supply, 1,172.

The claimant fully prepared himself to carry out and perform said contracts on his part; and to that end he sent an agent to Fort Sill, and one also to Camp Supply, to receive hides for him; and for their services and necessary expenses he paid them $1,256.75. Said agents were not sent to those points by order of General Morgan, nor did they in any way represent him or any other officer of the United States.

If the hides had been delivered to the claimant's agents at Fort Sill and Camp Supply, they could have been sent thence to Leavenworth, Kansas, by trains returning thither, after having taken out supplies to military posts. At Leavenworth they would have been worth 21 and 22 cents per pound; which, after paying the price stipulated in said contracts, and the expense of agents and of transportation to that place, would have yielded the claimant a profit.

At Fort Sill and Camp Supply there was no market for hides, and none were sold there, except by Indians to traders.

Upon the foregoing facts the conclusion of law is, that the claimant is not entitled to any recovery, because there was no breach of the contract by the defendants.

The grounds of this conclusion appear in the following

Opinion.

DRAKE, Ch. J., delivered the opinion of the court:

In the view we take of this case it is not necessary to discuss the question whether General Morgan was authorized to make, on behalf of the United States, the contracts sued on.

The claimant's case assumes that, under the contracts, he was entitled to all the hides taken from the cattle issued to Indians at Fort Sill and Camp Supply. This does not appear to us to be the meaning of the contracts. The words are, "That said party of the second part shall have all the hides of beef-cattle slaughtered for Indians at Fort
11 Sill, Indian Territory, up to and including June 30, 1870, which the superintendent of Indian affairs at that place shall decide are not required for the comfort of the Indians, the number of the hides to be about four thousand, more or less." The same words, in substance, are in the contract relative to the cattle to be slaughtered at Camp Supply.

These words did dot entitle the claimant to all the hides, but only such as the superintendent of Indian affairs at either place should decide were not required for the comfort of the Indians. The decision of that officer to that effect was, therefore, the very foundation of the claimant's

right to any hides at all; and yet it does not appear that any such decision was made; but, on the contrary, we are authorized to infer that if that officer made any decision on the subject, it was that all the hides were required for the comfort of the Indians; for all the cattle were turned over to them on foot, to do with as they pleased.

The claimant has, therefore, failed to show the very fact that was indispensable to establish his right to any hides, failing in which there is no ground for alleging a breach of the contracts.

His petition must, therefore, be dismissed.

Judge Loring did not sit at hearing of this case, and took no part in the decision.

12 United States Court of Claims, December term, 1872.

W. C. LOBENSTEIN *vs.* THE UNITED STATES. } No. 6416.

Be it remembered that on the 28th day of Oct., 1873, comes the said claimant by his solicitor, Charles F. Peck, and moves the honorable court to find specifically the following facts in this case:

First. That the two contracts, as set forth in the petition, were made by the claimant with M. R. Morgan, Bvt. Brig. Gen'l & C. S., on the day set forth in said petitions.

Second. That the claimant fully prepared himself in all respects to carry out and perform said contracts on his part, and unavoidably and necessarily expended in such preparation the aggregate sum of $1,256.75.

Third. That the United States wholly failed, on its part, to carry out and perform said contract and did not deliver any hides of beef-cattle whatever, although the claimant was ready and prepared to receive all of said hides at the places specified and within the time specified
13 in said contracts.

Fourth. That the Subsistence Department furnished at the places specified in said contract, within the time specified in the contracts, for subsistence of Indians, 6,500 beef-cattle, and that 4,141 of said beef-cattle within the time specified were slaughtered for that purpose.

Fifth. That no action was taken by the United States Government under the provision of the contracts reserving a right to retain none of the beef-hides from said cattle slaughtered as aforesaid for the comfort of the Indians.

Sixth. That the fair market-value of 4,141 beef-hides from cattle purchased as aforesaid by the Subsistence Dept. for the Indians, dry-cured and in good condition, within and during the period said contracts run, over and above all expenses of receiving, transportation, care of, and purchase-money, was 8,083.46 dollars, and that of the total amount of expenses necessary to have been incurred by the claimant in receiving, caring for, and transporting all of said hides, the claimant actually and necessarily expended the sum of 1,256.75 dollars.

C. F. PECK,
Attorney for Claimant.

WASHINGTON, D. C., *Oct. 28th*, 1873.

14 Upon the foregoing proposed findings by the claimant the court make the following order, to wit:

The first, second, and third of the above findings are refused in this

form because the facts therein stated are embodied in the court's findings.

The fourth is refused because not sustained by the evidence.

The fifth and sixth are refused because in the view of the case taken by the court in its opinion they are immaterial.

By the court.

15 In the Court of Claims.

WILLIAM C. LOBENSTEIN
vs.
THE UNITED STATES. } No. 6416.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon, of the application of the solicitor for claimant for the allowance of an appeal, as filed in the clerk's office January 14, 1874, and of the order of the court allowing the same, of the findings of fact and conclusions of law by the court, of the opinion of the court, and the proposed findings by claimant, with the order of the court thereon.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Washington, this twenty-first day of January, A. D. 1874.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) No. 143. William C. Lobenstein, appellant, vs. The United States. Court of Claims. Filed 28 January, 1874.

REC. 143—2

In the Supreme Court of the United States.

OCTOBER TERM 1875.

WILLIAM C. LOBENSTEIN, *Appellant*,
vs.
THE UNITED STATES. } No. 143.

APPELLANT'S ASSIGNMENT OF ERROR.

The Court of Claims erred in deciding there was no breach of the contracts and in dismissing the petition.

ARGUMENT.

The particular question at issue before this court in this case is as to the proper construction and meaning of the following clauses of the contracts, viz:

"That the said party of the second part (claimant) shall have all the hides of the beef cattle slaughtered for Indians at Fort Sill, Indian Territory, up to and including June 30, 1870, which the Superintendent of Indian Affairs at that place shall decide are not required for the comfort of the Indians; the number of hides to be about four thousand, (4,000,) more or less." (Record, page 5.)

"That the said party of the second part (claimant) shall have all the hides of the beef cattle slaughtered for Indians at Camp Supply, Indian Territory, up to and including June 30, 1870, which the Superintendent of Indian Affairs at that place shall decide are not required for the comfort of the Indians; the number of hides to be about two thousand, (2,000,) more or less."

The claimant necessarily expended $1,256.75 in order to send and maintain agents to superintend the skinning, and to secure and take care of hides agreeably to the other provisions of the contracts, but got no hides. (Reccord, page 7.)

This the Court of Claims says was no breach of the contracts, the claimant having failed to show that the decisions of the Superintendents of Indian Affairs were made. (Record, page 8.)

In stating the grounds of this conclusion the court omit to give their opinion as to the purpose the contracting parties had in the specifications of numbers of hides the claimant was to have. These specifications are not mentioned or referred to in the statement of the grounds of the conclusion. The conclusion is incompatable with the specification. Manifestly the specification of the number of hides the claimant was to receive was the sole guarantee under which he incurred the heavy expense necessary to send agents so far to superintend the skinning and to care for and preserve the hides. If this guarantee or specification had been excluded from the contracts, William C. Lobenstein, a discreet and prudent dealer in hides at Leavenworth, Kansas, would not have spent a dollar in the enterprise. Without this specification the contracts on their face would be worthless, as the Court of Claims has held them to be, and there cannot be a reasonable doubt that Gen. Morgan made it in order to induce the claimant to make the necessary advances of cash and labor to carry the contracts into execution. In the construction of these contracts the claimant has an undoubted right to have the benefit of these clauses. Effect must be given to these clauses by way of guaranty of number of hides the claimant should have in order to give any effect to the remaining provisions. The cattle slaughtered for Indians were to be skinned. When the skinning was accomplished the Superintendent of Indian Affairs was to decide *shall decide*, are the words.

It was intended, of course, to make such a margin in the specification of numbers as to enable the superintendent to retain as many as were required for the *comfort* of the Indians. How many beef hides can be appropriated for comfort for Indians? Obviously, as many as are needed to patch lodges. An officer of the United States army charged with the purchase of beef cattle for issue as subsistence, charged also, by the Army Regulations, to sell hides and all superfluous property, (Army Regulations, par. 1, 233,) and specially charged by the Commissary General of Subsistence to preserve and save for sale when practicable hides of the cattle purchased, (Record page 5;) in the present instance entered into contracts for the preservation and sale of hides by the only practicable method known to him, with a view to save a large sum to the Government. It was promised that these cattle should be skinned under supervision of claimant's agents, (Record, p. 6,) and that decision should be made by superintendents of Indian Affairs as to how many was required for the comfort of the Indians, and that the claimant should have them all subject to this reservation, and that the number in one case should be "2,000 more or less," (Record p. 6,) and in the other "4,000 more or less," (Record p. 5,) in consideration of his expenses in sending and maintaining agents to preserve them, and of the payment of two dollars each.

The question as to how many cattle were to be purchased for issue at the places mentioned in the contracts, and as to the probable number of hides from them the Indians would need for their comfort was matter known to the Government and not to the claimant; and having this knowledge the Government induced the claimant to enter into these contracts, involving a heavy outlay, by promising that the number of hides he should have should be 2,000 more or less, and 4,000 more or less respectively.

The minimum numbers that will satisfy these specifications are 1,000 hides in the Camp Supply contract and 3,000 in the Fort Sill contract.

We therefore ask that the judgment of the Court of Claims be reversed, with directions to enter a judgment for the amount of damages the claimant has sustained by withholding on the part of the Government, from him, 4,000 beef hides of average size, dry cured and in good order.

The damages he has sustained are measured by the market price of the hides in Leavenworth, the market for which they were purchased, less the purchase price and the necessary expenses of superintending the skinning, care of, and transportation from places of reception to Leavenworth, Kansas. and the expenses thereof carried

C. F. PECK,
Claimant's Solicitor.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1875.

No. 143.

WILLIAM C. LOBENSTEIN, APPELLANT,

vs.

THE UNITED STATES, APPELLEE.

SUPPLEMENTAL BRIEF FOR APPELLANT.

I.

General Morgan, the Commissary of Subsistence at Fort Leavenworth, was authorized to make the contracts.

Congress provided in the fourth section of the act approved April 10th, 1869, as follows:

"SEC. 4. *And be it further enacted*, That there be appropriated the further sum of two millions of dollars, or so much thereof as may be necessary, to enable the President to maintain the peace among and with the various tribes, bands and parties of Indians, bring them, where practicable, upon reservations, relieve their necessities, and encourage their efforts at self support; a report of all expenditures under this appropriation to be made in detail to Congress in December next."

Stat. at Large, Vol. XVI, p. 40.

In pursuance of this act an arrangement was entered into between the Department of the Interior and the Depart-

ment of War, for the supply through the Subsistence Department of the army, of beef cattle to the Indians.

By that arrangement the Department of War undertook to supply, through its Subsistence Department, such cattle as should be needed for Indians in the vicinity of Camp Supply and Fort Sill; and in reference thereto, as well as to other matters, the Commissary General of Subsistence of the army, on the 26th of May, 1869, gave written instructions to Brevet Major General H. F. Clarke, Assistant Commissary General of Subsistance in the military division of the Missouri; which instructions, in connection with the matter of furnishing said cattle, contained the following words:

"The cattle should be by contract, if possible—delivered by the contractors monthly or weekly—and when received, actually weighed upon the scales, to be transferred to the agents on foot; the Indians to have the benefit of the fifth quarter extra. The hides to be preserved and saved for sale when practicable."

The agents here referred to were officers of the army, appointed to act as Indian agents at the several places where subsistence supplies were to be issued to the Indians.

General M. R. Morgan, Chief Commissary Subsistence of the military department of the Missouri, stationed at Fort Leavenworth, Kansas, was charged with the supervision of the subsistence of the Indians on the southern reservation, which included those to be supplied from Camp Supply and Fort Sill; and the aforesaid instructions to General Clark were transmitted to him for his guidance. (*Record, p.* 5.)

The act of the heads of departments are presumed to be the act of the President.

The United States vs. *Jackson*, 13 *Peters' R., p.* 498.
The United States vs. *Eliason*, 16 *Peters*, 301.

It is the duty of the officers of the subsistence department to purchase supplies of this character.

Rev. Stat., *p.* 207, *Sec.* 1141.

General Morgan's instruction, both directly and by necessary implication, required him to exercise due economy by disposing of these hides.

The army regulations do not forbid, but sanction sales made as these were.

Sections 1227 and 1228, referred to by the appellee, are as follows:

"SECTION 1227. Sales of subsistence supplies by the Government, except sales of stores to officers for their personal use, and in like cases, shall be on due public notice, and in such markets as the interests of the service may require. The order for the sale, the auctioneer's bill of sale, exhibiting the names of purchasers, articles, and quantities sold, prices obtained, &c., and a copy of the inspection report, shall accompany the return of provisions to the Commissary General.

"SEC. 1228. Subsistence supplies, in good condition, but not required for use, will be disposed of by orders from the Commissary General. In urgent cases, and on the advice of an inspecting officer, they may be sold as prescribed in preceding paragraph."

These do not relate to hides—hides are not subsistence supplies.

Neither do these sections require sales to be made by auction.

Section 1233 expressly provides for the sale of hides. It is as follows:

"Empty barrels, boxes, HIDES, &c., shall be sold, and the net proceeds of sale accounted for as indicated in preceding paragraph."

That sales of hides were not to be made by auction is manifest from an examination of forms 9 and 10, referred to in the

preceding paragraph. See page 271 Army Regulations, where the following items are found:

"By sales of stores at auction."

"By sales of barrels, boxes, hides," &c.

II.

It is objected that the contract was for the sale of the hides of cattle slaughtered for the Indians, and that inasmuch as the Government officers, or employees, did not slaughter any of the cattle, but the agent turned them over on foot to the Indians, there was nothing for the contract to operate upon.

This interpretation results from regarding a part of the contract only. It reads "that the said party of the second part shall have all the hides of beef cattle slaughtered for Indians at Fort Sill, Indian Territory, up to and including June 30th, 1870, which the Superintendent of Indian Affairs at that place shall decide, are not required for the comfort of the Indians; *the number of hides to be about* 4,000, *more or less.*" It is this last clause which the appellee wholly rejects.

Contracts are to be construed according to the intention of the parties as gathered from the expressions used and the surrounding facts and circumstances to which these expressions must be applied. The facts were that the Government was about supplying several thousand head of cattle for feeding the Indians. It was wholly within the discretion of the agents of the Government, whether these should be delivered to the Indians on the hoof or as slaughtered beef.

The Commissary General and his assistants decided that the cattle should be first slaughtered and the hides sold. This is evident from the instructions of the Commissary General, and it also appears from the contract. The number of hides to be furnished was estimated, and that estimate formed the basis of the contract. The contractor protected himself from any such evasion by a stipulation that the con-

tract should cover a sufficient number of hides to justify him in the expenses he must incur.

The expression "the number of hides to be about 4,000 more or less," manifest plainly that General Morgan and Mr. Lobenstine both supposed and intended that about so many hides would be delivered; and the other expressions show that they supposed and intended that the cattle should be slaughtered *for* and not *by* the Indians.

Good faith and honest dealing forbid that such evasions should defeat a contract fairly entered into.

While the statement, 4,000 more or less, does not rigidly control the contract, it does not admit of any serious departure from that number.

"According to Day *vs.* Finn, Owen, 133, cited in 9 Vin. Abr., 343, Pl. 10, *sive plus sive minus*, shall be intended of a reasonable quantity, more or less, by a quarter of an acre, or two or three at the most. The words must naturally refer to the extent of the grant.

"Thus, in Quesnel *vs.* Woodlief *et al.*, cited in 2d Hen. & Munf., 173, (note,) it was decided that those expressions in a deed must be restricted to a usual or reasonable allowance for small errors in surveys, and for variations in instruments.

"In Nelson *vs.* Matthews, 2 Hen. & Munf., 173, it was adjudged that a deficiency of eight acres in a tract of 532 acres was no more or less than a purchaser who buys for more or less might reasonably expect, but that it was otherwise as to a deficiency of twenty acres.

"It cannot, therefore, be said here that a title for 903$\frac{1}{10}$ acres could be deemed equivalent to 991$\frac{1}{4}$ acres, although the words more or less are inserted in the conveyance."

6 *Binney's R., p.* 113.

"A contract for about 300 quarters, more or less," of rye shipped on board a certain vessel, does not bind the purchaser to take 345 quarters.

Cross vs. *Elgin*, 2 *Barn. & Adolphus' R.*, 106.

It is a mistake to suppose that the Commissioner of In-

dian Affairs interfered with the operation of this contract. His directions agreed with the orders of the Commissary General. They both directed that the army officers, acting as Indian agents, should receive the cattle on the hoof. These officers turned the cattle over to the Indians alive, apparently on their own responsibility. (Record, pp. 6, 7.)

III.

It is objected that the claimant should have such hides only as the Superintendent of Indian Affairs should decide were not required for the comfort of the Indians. That this decision was a condition precedent to his becoming entitled to any hides. And as that official never acted in the matter the claimant cannot recover. This is an entire misapprehension of the law of the case. The facts are undisputed. The Superintendent of Indian Affairs made no decision as to the hides which were or were not required for the comfort of the Indians, because there were no hides with reference to which he could decide. And there were no hides because the agents of the Government concluded not to have the cattle slaughtered, but to turn them over alive.

In other words, the superintendent was prevented from making any decision by the act of the other Government agents in disposing of the cattle on the hoof. There was a condition which preceded this condition precedent, which was, that the cattle should have been slaughtered by the Government agents. This so-called condition precedent, brought forward to defeat this contract, most strongly establishes its validity. How could the superintendent decide what hides should be given to the claimant and what to the Indians, unless the Government agents had the hides in their possession?

The agents of the Government prevented his making a decision by removing all opportunity and ground for it, and then object that we must fail because he made no decision.

The rule of law in such a case as this is well settled.

It will always excuse the performance of a condition precedent that the performance was hindered or prevented by the other party.

No party can insist upon a condition precedent when its non-performance has been caused by himself.

Williams vs. *The Bank of the U. S.*, 2 *Peters' R., p.* 102.
Betts vs. *Perrine*, 14 *Wend. R., p.* 219.
Camp vs. *Barker*, 21 *Verm. R., p.* 469.
Marshall vs. *Craig*, 1 *Bibb R., p.* 384.
Majors vs. *Hickman*, 2 *Bibb R., p.* 218.
Jones vs. *Walker*, 13 *B. Mon. R., p.* 163.
Fleming vs. *Gilbert*, 3 *Johns. R., p.* 528.
McNairy vs. *Bishop*, 8 *Dana R., p.* 150.
Mayor, &c., vs. *Butler*, 1 *Barb. R., p.* 338.

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Attorney for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1875.

WILLIAM C. LOBENSTEIN, APPELLANT,
vs.
THE UNITED STATES. } No. 143.

APPEAL FROM THE COURT OF CLAIMS.

Brief for the United States.

ernment agents) for the Indians, there was never anything for it to operate upon, since the animals were turned over alive to the Indians, and became their absolute property, subject to no control by Government officers.

III.

The claimant, in any event, was only to have such hides as the superintendent of Indian affairs should decide were not required for the comfort of the Indians. (Report, pp. 2 and 3.)

This decision was a condition precedent to his becoming entitled to *any* hides; and it makes no difference whether that official never made any decision, or decided that all the hides were required by the Indians, for their comfort; in either case, the claimant cannot recover.

(Thurnell *v.* Balbirnie, 2 M. & W., 786, 790; Worsley *v.* Wood, 6 T. R., 710; Milner *v.* Field, 5 Exch., 829; Morgan *v.* Birnie, 9 Bing., 672; Cook *v.* Jennings, 7 T. R., 384; Moakley *v.* Riggs, 19 John., 69; Taylor *v.* Bullen, 6 Cowen, 629.)

The contract was subject to the superintendent's arbitration upon the point of what was required for the comfort of the Indians; if he declined to arbitrate, or decided adversely to the claimant's having any hides, the result would be the same. In either contingency the contract was at end. (Cases cited *supra:* Palmer *v.* *v.* Clark, 106 Mass., 389; Flint *v.* Gibson, Id., 391; Grafton *v.* Eastern Cos., 8 Exch., 699.)

Counsel say, at the bottom of the third page of Claimants brief, that "the minimum numbers that will satisfy these specifications are 1000 hides in the Camp Supply Contract and 3000 in the Fort Sill Contract."

Why 1000 and 3000? no determinate number is fixed, might claim 5000 and 3000. No number fixed, because determination was to be made another way;- i.e., by the decision of the Indian Agent.

By the petition [Recad.] 6000 are claimed. though a larger quantity than that alleged cannot be recovered for, yet the Contract would have allowed a larger Claim as well as 6000.

The Counsel's naming a less number in argument does not diminish the Claim. Of course if the proof showed a right to only the smaller number, that could be claimed, despite the petition; but here the proof sustains 6000 just as well as it does 4000 - and no better; - but the difference between the petition and his Counsel shows forcibly the uncertainty of the Contract, as they Claim it; - and as it, in fact is, until made Certain by the determination of the Indian Agent.

IV.

Of course the Court of Claims has the right to choose its own phraseology in stating the facts found, and no exception can be taken that it declined to adopt the language of the claimant, or refused to find a fact not proved, or which (if proved) was wholly immaterial.

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